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In the Supreme Court of the United States

October Term, 1973

No. 73-690

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO,

Petitioner,

v.

WESTERN ALFALFA COMPANY,

Respondent.

BRIEF FOR STATE OF OHIO AS AMICUS CURIAE

WILLIAM J. BROWN
ATTORNEY GENERAL OF
THE STATE OF OHIO
State House Annex
Columbus, Ohio 43215

Of Counsel:

RICHARD P. FAHEY
Assistant Attorney General
361 East Broad Street
Columbus, Ohio 43215
(614) 466-3258

JOHN EUFINGER
Assistant Attorney General
361 East Broad Street
Columbus, Ohio 43215
(614) 466-4262

THE JUDSON-BROOKS COMPANY—CLEVELAND

TABLE OF CONTENTS

	Page
TABLE OF CASES	ii
CONSTITUTIONAL PROVISIONS CITED	ii
STATUTES CITED	ii
RULES AND REGULATIONS CITED	ii
CONSTITUTIONAL PROVISIONS INVOLVED	1
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
INTEREST OF AMICUS	2, 3
ARGUMENTS	4-8
CONCLUSION	9

TABLE OF CASES

Page

Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967) 6, 8

See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed. 2d 943 (1967) 6, 7, 8

United States v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed. 2d 87 (1972) 7, 8

United States v. Morton Salt Co., 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 40 (1950) 5, 8

CONSTITUTIONAL PROVISIONS CITED

Fourth Amendment to the United States Constitution, Title 28, U.S. Code, Section 1257 1

STATUTES CITED

Clean Air Amendments of 1970, 42 U.S.C. Sections 1857-1857(1) 2, 4

Ohio Revised Code, Section 3704.03(M) 3

REGULATIONS CITED

40 CFR 51.11(a)(5) 5

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CONSTITUTIONAL PROVISION INVOLVED

Article IV of the Amendments to the Constitution of the United States provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

QUESTIONS PRESENTED

A. Does failure to notify an industrial pollutor of a Ringelmann or opacity reading at the time the reading is

taken or prior to the reading violate the provision of the Fourth Amendment to the United States Constitution?

B. Is it necessary to obtain the consent of an industrial pollutor prior to taking a Ringelmann or opacity reading from the premises of the particular industry, and if the consent is not obtained, is the taking of the Ringelmann or opacity reading a sufficient invasion of the right of privacy of the industry to constitute a violation of the Fourth Amendment to the United States Constitution?

C. Where inspections and the taking of opacity and Ringelmann readings are necessary to further urgent federal and state interests to protect the environment pursuant to federal and state law, is the possibility of abuse and the threat to privacy of such dimension that the taking of a Ringlemann or opacity reading without a warrant or consent a violation of the Fourth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Amicus adopts the statement of the case as presented by Petitioner.

INTEREST OF AMICUS

The seriousness of the threat posed by air pollution to the health and welfare of our Nation moved Congress to enact the 1970 Amendments to the Clean Air Act, 42 U.S.C. Sections 1857-1857(1), Pub. L. 91-604, 84 Stat. 1713 (1970) (hereinafter "Act"). This Act creates the federal machinery to insure that each state's clean air implementation plan meets rigorous federal standards, but expressly leaves the major enforcement responsibilities in the hands of the states. See Section 110, 42 U.S.C. Section 1857 c-5.

Ohio, as required by the Act, has prepared a clean air implementation plan. Central to the functioning of

Ohio's plan are the inspection and testing powers contained in Ohio Revised Code, Section 3704.03(M), which authorizes the Ohio director of environmental protection:

> Through any employee, agent, or authorized representative of the director or the environmental protection agency, [to] enter upon private or public property, including improvements thereon, at any reasonable time for the purpose of making inspections, conducting tests, and examining records or reports pertaining to any emission of air contaminants and of determining if there are any actual or potential emissions from such premises, and if so, to determine the sources, amounts, contents, and extent of such emissions, or to ascertain compliance with sections 3704.01 to 3704.11 of the Revised Code, any orders or regulations adopted thereunder, or any other determination of the director. If entry or inspection authorized by this division is refused, hindered, or thwarted, the director or his authorized representative may by affidavit apply for, and any judge of a court of record may issue, an appropriate inspection warrant necessary to achieve the purposes of this chapter within the court's territorial jurisdiction.

Being a highly industrialized state with several heavily populated urban centers, Ohio is responsible for the regulation of many thousands of air pollution sources. Because violations of state and federal air pollution standards can be concealed or corrected in a short time, any attempt to regulate air pollution necessarily depends upon frequent unannounced inspections and tests of air pollution sources.

Ohio's vital interest in insuring the protection and enhancement of its air quality is the basis for its concern with the outcome of this litigation. Should this Court conclude that notice, consent or a warrant is required before any inspections or tests of air pollution sources can be conducted upon a commercial premises, the state's ambient air quality implementation plan would be rendered virtually unenforceable.

ARGUMENTS

1.

THE INSPECTIONS AND TESTS CONDUCTED BY COLORADO OFFICIALS AS PART OF THE STATE'S AIR IMPLEMENTATION PLAN ARE REGULATORY IN NATURE, AND WHEN CONDUCTED UPON BUSINESS PREMISES WITHOUT NOTICE, CONSENT OR A WARRANT, DO NOT VIOLATE THE STANDARD OF THE FOURTH AMENDMENT WHEN THE AUTHORIZING STATUTE IS VALID.

A. The Clean Air Act Amendments Of 1972 Require The States To Enforce Federal Ambient Air Quality Standards Through Programs Of Inspection And Testing Of Air Pollution Sources.

"[T]o protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," Congress enacted the Clean Air Amendments of 1972. Section 101(b)(1), 42 U.S.C. Section 1857(b)(1). Under the Act, the federal government established national ambient air quality standards to protect the public health and welfare. Section 109, 42 U.S.C. Section 1865. However, the Act placed the major responsibility for implementation of the national ambient air quality standards on the states.

Under the scheme of the Act, the states are in effect made agents in the enforcement of this federal statute. To this end regulations were promulgated by the Administrator of the United States Environmental Protection Agency setting forth requirements for the state implementation plans, including the requirement that:

> Each plan shall show that the state has legal authority to carry out the plan, including the authority to:

. . .

> (5) Obtain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations and standards, including authority to require record keeping and to make inspections and conduct tests of air pollution sources.
> 40 CFR 51.11(a)(5).

By requiring the power of inspection and testing as a part of each approvable state implementation plan, the Administrator recognized their necessity to any enforcement effort.

B. The Traditional Fourth Amendment Standard For Reasonable Search And Seizures Applied To The Individual Citizen's Private Residence Does Not Apply To Regulatory Inspections Of Commercial Premises.

The purpose of the Fourth Amendment is to safeguard the privacy of individuals against arbitrary invasion by government officials. That a business association does not enjoy the same right to privacy as an individual citizen was made clear by this Court in *United States v. Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 40 (1950). In *Morton*, the Fourth Amendment question focused upon the reasonableness of an administrative subpoena of corporate books and records. In holding that such a subpoena cannot be so broad as to be unreasonably burdensome, this Court said:

> While they may and should have protection from unlawful demands made in the name of public investigation, corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.
> 338 U.S. 632, 652, 70 S.Ct. 357, 368 (1950).

This distinction between the Fourth Amendment standard of reasonableness as it applies to individuals and business entities appears to account for this Court's ruling on two companion cases when it considered the necessity of a warrant for area-wide fire and safety inspections. In *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967), it was held that administrative searches of *private residences* by municipal health and safety inspectors constituted a significant intrusion upon interests protected by the Fourth Amendment, and a search warrant was required.

The companion case of *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed. 2d 943 (1967), arose from the refusal of the owner of a commercial building to allow a warrantless administrative inspection of the property by fire officials engaged in a routine, periodic city-wide canvass. This Court said:

> The only question which this case presents is whether *Camara* applies to similar inspections of commercial structures which are not used as private residences. 387 U.S. 541, 542, 87 S.Ct. 1737, 1739.

It was held that such an administrative inspection of a commercial building conducted as part of a routine area-wide canvass required consent or some form of warrant, but not necessarily one issued upon probable cause as required by *Camara* for private residential inspections. However, the decision was a narrow one which did not touch upon inspections of particular premises for a regulatory purpose:

> We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product.
> 387 U.S. 541, 545-546, 87 S.Ct. 1737, 1740-1741.

While the *See* opinion left many unanswered questions, it is clear that the Fourth Amendment standard of reasonableness as applied to individuals and businesses is not the same. What may be a violation of an individual's Fourth Amendment rights is not necessarily violative of a business association's Fourth Amendment rights.

C. The Regulatory Inspection And Testing Of A Private Commercial Premises Does Not Violate The Reasonableness Standard Of The Fourth Amendment If It Is Authorized By A Valid Statute.

In *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed. 2d 87 (1972), many of the unanswered questions of *See* concerning the relationship of the Fourth Amendment to regulatory inspections of private commercial premises were settled. In that case, a warrantless and unconsented search of a locked storeroom during business hours, as part of the inspection procedure authorized by 19 U.S.C. Section 923(g) of the Gun Control Act of 1968, resulted in the seizure of unlicensed firearms from a dealer federally licensed to deal in sporting weapons. This Court held that such a regulatory inspection, without consent or warrant, was not violative of the Fourth Amendment's prohibition against unreasonable searches and seizures:

> In the context of a regultaory inspection of business premises that is carefully limited in time, place and scope, the legality of the search depends not on consent, but upon the authority of a valid statute. 406 U.S. 311, 315, 92 S.Ct. 1593, 1596.

Furthermore,

> Here, if inspection is to be effective and serve as a credible deterrant, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and fre-

quency is to be preserved, the protections afforded by a warrant would be negligible.
406 U.S. 311, 315, 92 S.Ct. 1593, 1596.

Unlike the building inspections in *See* and *Camara*, inspections conducted by state air pollution officials have as their object the detection of pollution incidents which can be concealed or corrected in a short period of time. Moreover, if the air quality is to meet the National Ambient Air Quality Standards for health and safety, it is crucial that all sources be made to comply. As with the regulation of firearms in *Biswell*, the successful regulation of air pollution sources is dependent largely upon voluntary compliance by the owners and operators of the regulated source of air pollution. The only effective deterrant to such sources willfully avoiding compliance, which very often is economically costly, is the ability of state officials to make frequent unannounced inspections and tests.

The intrusion upon commercial premises authorized by the Colorado statute was limited in purpose and scope. As such it infringed little, if any, upon the reasonable expectations of privacy enjoyed by the corporation. *See Morton Salt Co., supra*, p. 5. To require a warrant for every inspection and test similar to the one which is the subject of this case would hopelessly bog down the enforcement of the federal and state air laws. Indeed, as *Biswell* makes clear in a situation such as that presented upon appeal here, neither a warrant nor consent is required as long as the authorizing statute meets the standard of reasonableness required by the Fourth Amendment for business premises.

CONCLUSION

The Order appealed from should be reversed.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 1974, two copies of the Amicus Brief in Support of Petitioner were mailed, postage prepaid, to all counsel of record in the main proceeding. I further certify that all parties required to be served have been served.

WILLIAM J. BROWN
ATTORNEY GENERAL OF OHIO

By RICHARD P. FAHEY
Assistant Attorney General
361 East Broad Street
Columbus, Ohio 43215
(614) 466-3258